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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN LAMONT WILSON,

Defendant and Appellant.

E054550

(Super.Ct.No. RIF150851)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge.

Affirmed.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Kevin Lamont Wilson, is serving 75 years to life in prison after a jury convicted him of attempted murder, false imprisonment and robbery for shooting his

robbery victim in the head. Defendant argues: 1) the attempted murder and robbery were part of the same course of conduct under Penal Code section 654,¹ and so one of those sentences should have been stayed; and 2) the trial court abused its discretion because it was unaware it could have imposed the three indeterminate sentences concurrently rather than consecutively. As discussed below, we find no error and affirm the conviction and sentence.

FACTS AND PROCEDURE

On the morning of June 4, 2009, Kelly Herrera was working alone at his business in Riverside. Herrera owned the business, which produced software and hardware for magnetic card readers. Two men entered the building with an encoder and a laptop and asked Herrera to look at the encoding software to see what was wrong with it. Herrera did so, with one man on his left side and one on his right side. After he told the men the software was working, one of the men cocked a gun and placed it at the back of Herrera's head. The man told Herrera to take them back to an office where the security camera was and that nothing would happen to him. The men had Herrera remove the tape from the camera and directed him to a second camera in the back warehouse portion of the building. The second camera was only a monitor and had no tape.

The man with the gun told Herrera to remove the money from his wallet and then to open all three safes at the back of the warehouse, which Herrera did by using a code. Herrera placed the money from his wallet on the top shelf of one of the safes with the

¹ All section references are to the Penal Code unless otherwise indicated.

money that was already there. The safes were about five feet tall and contained petty cash, card readers, encoders and some “very expensive machines we keep in there.” In his testimony at trial, Herrera did not recall whether the men removed anything from the safes at that point.² When asked if defendant and his cohort took anything from the safes after he opened them, Herrera answered “I really don’t recall because what comes after. I didn’t even look behind.”

The man with the gun told Herrera to open the back door to the warehouse, which opened up onto an alley, about 15 feet away from the safes. A sport utility vehicle (SUV) was parked in the alley and another man was standing in front of it. While standing just outside the door in the alley, Herrera attempted to escape because he feared he would be killed if he re-entered the building. The man with the gun grabbed Herrera by the shirt, turned him around and shot him in the forehead. Herrera felt blood gushing down his head. Herrera ran to another shop, where the occupants had him sit down and called the police.

Herrera later identified defendant from a photographic lineup as the man who held the gun on him and shot him. The bullet did not penetrate Herrera’s skull, but went through his scalp and exited through the back of his scalp. The shell casing was found in the alley. The men left behind the laptop computer they had brought into the business, which allowed police to identify and track down defendant.

² After the robbery, it was determined that about \$5,000 in cash, along with some credit card scanners and other machinery, had been taken from the safes.

One of the occupants of the shop down the alley testified that defendant told her “that they walked him to the back to a safe he had. They had had him open it, they took whatever was there.” She told the investigating officers that Herrera said the robbers took his wallet on the way back to the safes. On cross-examination, she answered “yes” when asked whether “He told you they took stuff out of the safe.”

Riverside Police Officer Hart testified that, when he responded to the 911 call, Herrera told him that the robbers “made him open the safe and they took the money from his safe and his wallet.” On cross-examination by the defense, Officer Hart answered “yes” when asked “And he saw them drive away. Did he tell you that? He also saw three black males drive away in a newer black SUV. Is that what he told you?”

Police Detective Medici testified that Herrera returned to the business a few hours after the crime while Medici was processing the crime scene. At some point, Herrera told Medici that the robbers had taken about \$5,000 in cash, along with portable credit card scanners and recorders.

On December 22, 2009, the People filed an information charging defendant with attempted premeditated murder (§§ 664 & 187, subd. (a)), kidnapping to commit robbery (§ 209, subd. (b)(1)) and robbery (§ 211). As to each of the three crimes, the People also alleged defendant personally discharged a firearm and caused great bodily injury (§ 12022.53, subd. (d)). The People also alleged defendant had two prior “strike” convictions. (§§ 667, subs. (c) & (e)(2)(A), 1170.12, subd. (c)(2)(A).)

On March 5, 2010, the trial court reduced the kidnapping charge to false imprisonment (§ 207, subd. (a)) and dismissed the corresponding firearm enhancement, pursuant to section 995.

On March 15, 2011, a jury found defendant guilty of all three charges and accompanying enhancements. The following day, the trial court found that defendant had two prior strike convictions.

On September 16, 2011, the court sentenced defendant to a total of 75 years to life as follows: 25 years to life for the attempted murder, plus 25 years to life for the associated firearm enhancement, plus 25 years to life for the robbery. The court also imposed 25-years-to-life sentences for the false imprisonment and the firearm enhancement associated with the robbery, but stayed them both pursuant to section 654. This appeal followed.

DISCUSSION

1. Penal Code Section 654

Defendant argues his sentence for either the attempted murder or for the robbery should have been stayed pursuant to section 654. He claims that the attempted murder was merely incidental to the robbery.

a. General Statement of the Law on Section 654

Section 654, subdivision (a) provides in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” Section 654

precludes multiple punishments not only for a single act, but for an indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the actor. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct. (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.)

The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts. (*People v. Beamon* (1973) 8 Cal.3d 625, 630-639.) The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Defendant claims the evidence here does not support the trial court's finding that the crime of attempted murder was divisible from the robbery. He maintains he harbored one criminal intent and objective, i. e., the commission of the robbery, and the attempted murder was merely incidental.

b. *Cases Specifically Addressing Robbery*

The consensus of the case law on this subject is that section 654 applies when the defendant commits the crime of violence against a victim of the robbery as a means to commit the robbery. Similarly, section 654 does not apply when the defendant has already taken the goods or money that are the object of the robbery, and then commits the crime of violence.

In the following cases, the courts held that section 654 applied because the defendant committed the crime of violence against the victim as a means to commit robbery.

In *People v. Flowers* (1982) 132 Cal.App.3d 584, one of the robbers assaulted the victim while the other rummaged through his hotel room, and one of them took his watch from his wrist. In *People v. Ridley* (1965) 63 Cal.2d 671, the robbers entered a pawn shop and pointed a gun at the owner. The owner attempted to knock the gun from the hands of one of the robbers, but the gun discharged, hitting another employee. The gunman shot the owner several times after the owner ducked beneath a counter, then took jewelry from a store safe and left.

In the following cases, the courts held that section 654 did not apply because the robbers had already obtained the “fruits of the robbery” (*In re Jesse F.* (1982) 137 Cal.App.3d 164, 171 (*Jesse F.*)) before committing the violent act on the victim.

In *People v. Nguyen* (1988) 204 Cal.App.3d 181 (*Nguyen*), one of the robbers of a market escorted the clerk into a bathroom in the back, where he took money and a passport from the clerk’s pockets while the other robber remained up front and took

money from the cash register. The first robber then kicked the clerk in the ribs and shot him. In *Jesse F.*, the defendant and his cohorts took the victim's car keys, watch and money from him before he attempted to run away and then they cut the victim across the eye and hit him on the back of the head. In *People v. Hawkins* (1968) 268 Cal.App.2d 99, a bank employee had given the bank robbers the money that was in the cash drawers and confirmed that there was no money in the safe before one of the robbers struck a customer over the head from behind and stated "I told you this was a holdup." In *People v. Birdwell* (1967) 253 Cal.App.2d 621, the robbers of a gas station had taken the money from cash boxes outside the station when one of them shot the night manager as he turned around toward the sound of a gun cocking. In *People v. Massie* (1967) 66 Cal.2d 899, the robbery victim surrendered his wallet and then turned to look at the robber. The robber said "Don't look at me, queer" and then shot victim.

Defendant argues that his act of shooting Herrera in the forehead was committed as a means of accomplishing the robbery, and was not an act involving a separate intent. Although the trial court could reasonably have drawn that conclusion, the court could also have reasonably concluded from the evidence that this additional act was a gratuitous act of violence committed after the robbers had obtained the "fruits of the robbery" that is, had removed the cash and items from the safe, along with the cash from Herrera's wallet, and were on their way to load them into the waiting SUV. Although Herrera testified that he did not remember whether the two men in the warehouse with him had removed any items from the safes after he opened them and before they headed toward the back door to the alley, he told one of the women whose shop he had run into

directly afterward that the robbers had taken some items from the safes. In addition, Herrera told Officer Hart, who responded to the 911 call, that the robbers had taken money from his wallet and from the safes, and that he had seen the three men leave together in an SUV. Thus, there is substantial evidence from which the trial court could have concluded that the robbers had already removed the money from the safes Herrera had opened, along with credit card scanners and recorders, before defendant shot Herrera in the forehead.

Moreover, we point to both the following quote from *Nguyen* and the fact that defendant had already stopped Herrera's escape attempt, grabbed Herrera by the shirt and turned him around before choosing to shoot Herrera in the head. "Penal Code section 654 . . . cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense. Once robbers have neutralized any potential resistance by the victims, an assault or attempt to murder to facilitate a safe escape . . . may be found by the trier of fact to have been done for an independent reason." (*Nguyen, supra*, 204 Cal.App.3d at p. 191.) Also for this reason, substantial evidence supports the trial court's decision not to apply Penal Code section 654.

2. Sentencing Court was Aware of its Discretion

Defendant argues this case should be remanded for resentencing because the trial court was unaware that it had discretion to sentence him to concurrent 25-year terms rather than three consecutive 25-year terms. Defendant points to the last page of the probation report, in which the exposure calculation is shown as 87 years to life, showing

an assumption that the terms must be served consecutively. We conclude that the record makes clear the trial court did not rely blindly on the probation report, and thus defendant cannot show the trial court was unaware of any discretion it had to impose concurrent sentences.

At the sentencing hearing, the trial court clearly stated that it believed the probation report's calculation of defendant's recommended sentence was incorrect. The court disagreed with the probation report that the indicated term for the attempted murder was 32 years to life. "[F]or Probation to come to 32 to life, what they did was take the seven to life and then add it to the 25 to life for the firearm under 12022.53. But here's the problem I have with that . . . it's clear to me that he, Mr. Wilson, should only be sentenced for the use of the firearm one time. I don't think it should be attached to the robbery as well as attached to the attempted premeditated murder." The court then had the parties go through the Penal Code with it to assist in calculating the correct sentence, which differed from that set forth in the probation report.

In addition, defendant cannot point to any part of the sentencing hearing transcript in which the trial court indicates in any way that it believes it must sentence defendant to consecutive terms.

Contrary to defendant's arguments, the appellate record in this case does not affirmatively reflect that the sentencing court misunderstood the scope of its discretion. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 943 [appellate court found "nothing in the record to suggest that the trial court misunderstood the scope of its discretion"].) For that reason, remand for resentencing is not appropriate. (*Id.* at p. 943.)

DISPOSITION

The judgment of conviction and the sentence are affirmed.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.